

**TITLE 85**  
**EXEMPT LEGISLATIVE RULE**  
**WORKERS' COMPENSATION ~~COMMISSION~~ RULES**  
**OF THE WEST VIRGINIA INSURANCE COMMISSIONER**

**SERIES 8**  
**WORKERS' COMPENSATION**  
**WORKERS' COMPENSATION POLICIES, COVERAGE ISSUES, POLICY DEFAULTS**  
**AND RELATED TOPICS**

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**§85-8-1. General.**

1.1. Scope. -- ~~This exempt legislative rule provides~~ These rules provide for: (1) the minimum contents of a policy issued for workers' compensation insurance pursuant to ~~West Virginia Code Section W. Va. Code §23-1-1 et seq.~~; (2) rate making and premium collection associated with a workers' compensation insurance policy; (3) ~~the consequences of entering policy default and resulting claim payments made from the uninsured employer fund~~ specific criterion and standards for clarification as to which entities need to carry workers' compensation coverage and which individuals are considered employees entitled to benefits under chapter thirty-three of the West Virginia Code; and (4) other coverage related topics.

1.2. Authority. -- W. Va. Code §§~~23-1-1a(j)(3); 23-2C-17(b); 23-2C-18(g); 23-2C-8(a)(4) 23-2C-22; 33-2-10(b); and 33-2-20(a).~~ Pursuant to W. Va. Code §§~~23-1-1a(j)(3) §§23-2C-5(c)(2) and 33-2-10(b),~~ rules adopted by the ~~Board of Managers and the Commission~~ industrial council and the insurance commissioner are not subject to legislative approval as would otherwise be required under ~~West Virginia Code W. Va. Code §29A-3-1 et seq.~~ Public notice requirements of that chapter and article, however, must be followed.

1.3. Filing Date. -- ~~December 20, 2005.~~

1.4. Effective Date. -- ~~January 20, 2006.~~

**§85-8-2. Purpose of Rule.**

This rule provides for the requirements of a basic policy to be used by private carriers of workers' compensation insurance, establishes ~~the~~ criteria for ratemaking and ~~premium collection~~ by private carriers beginning on July 1, 2008, ~~establishes the assessment methodologies, rates, payments and penalties necessary to operate the uninsured employers' fund~~ criteria for premium collection by private carriers, establishes specific criterion and standards for clarification as to which entities need to carry workers' compensation coverage and which individuals are considered employees entitled to benefits under chapter twenty-three of the West Virginia Code and provides rules regarding other workers' compensation coverage related topics.

**§85-8-3. Definitions.**

As used in this rule, the following terms, words, and phrases have the meanings stated unless in any instance where such term, word, or phrase is employed and the context expressly indicates that another meaning is intended.

~~3.1. "Act" means the workers' compensation laws of the state of West Virginia which are codified at W. Va. Code §23-1-1 et seq.~~

3.1. "Casual employer," as the term is used in W. Va. Code §23-2-1(b)(4)) and this rule, means an employer with three or fewer employees whose work is temporary, intermittent and sporadic in nature and does not exceed ten (10) calendar days in any calendar quarter.

~~3.2. "Base rates" means the loss cost calculated for each classification.~~

~~3.3. "Board" means the Workers' Compensation Board of Managers created pursuant to the provisions of W. Va. Code §23-1-1a.~~

~~3.4. "Classification" shall mean~~ means a categorization of ~~employers~~ employees for the purpose of assessing risk, rate making, and developing premium charges.

~~3.5. "Code of West Virginia" and "West Virginia Code" means the West Virginia Code of 1931, as amended.~~

~~3.6. "Commission" means the Workers' Compensation Commission created pursuant to the provisions of W. Va. Code §23-1-1.~~

~~3.7. "Domestic services" means services of a household nature performed by an employee in or about a private home of the person by whom he or she is employed. A private home is a fixed place of abode of an individual or family. If a dwelling house is used primarily as a boarding or lodging house for the purpose of supplying board or lodging to the public as a business enterprise, it is not a private home and the services performed therein are not domestic services.~~

In general, services of a household nature in or about a private home include services performed by cooks, butlers, housekeepers, governesses, maids, valets, baby sitters, care-takers, handymen, gardeners, and chauffeurs of automobile for family use.

The term domestic services shall not include services of a household nature performed by an employee in or about the private home of a person when that employee is employed by someone other than a member of the household. For example, employees of maid services, temporary employment agencies, or other businesses do not provide domestic services under the provisions of this rule.

~~3.8. "Employee" has the meaning ascribed to that term by W. Va. Code §§23-2-1 and 23-2-1a.~~

3.95. "Employer" has the meaning ascribed to that term by W. Va. Code §23-2-1, which includes, but is not limited to, any individual, sole proprietor, firm, partnership, limited partnership, limited liability company, joint venture, association, corporation, company, organization, receiver, estate, trust, guardian, executor, administrator, government entity or any other entity regularly employing another person or persons for the purpose of carrying on any form of industry, service or business in this state.

a. "Industry, service or business," as the term is used in W. Va. Code §23-2-1(a) and this rule, means an occupation or an employment engaged in for the purposes of obtaining a livelihood or for profit or gain.

b. "Carrying on any form of industry, service or business in this state," as the term is used in W. Va. Code §23-2-1(a) and this rule, means that the employer:

1. Has obtained authorization to do business in West Virginia; or
2. Operates a business or plant or maintains an office in West Virginia; or
3. In a particular claim, hired the claimant in West Virginia; or
4. Hires other West Virginia residents to work at a West Virginia facility or office; or
5. In a particular claim, utilized labor on a regular basis at a West Virginia facility for the employer prior to the injury at issue;

Provided, That an employer that meets one or more of the above stated criteria may still be exempt from having to maintain workers' compensation coverage under the provisions of W. Va. Code §23-2-1(b) or the provisions of subsection 4.3 of this rule.

3.6. "Employment" means all services performed by an employee for wages.

~~3.10. "Executive Director" means the executive director of the Workers' Compensation Commission as provided pursuant to the provisions of W.Va. Code §23-1-1b.~~

~~3.11. "Gross wages" means all wages paid to employees, whether payable in money or other valuable consideration, and shall include salaries, bonuses, commissions, profit sharing, and the reasonable money value of board, rent, housing, lodging and other goods and services. The commission retains the right to determine whether an item, not otherwise described in this provision, is reportable as "gross wages."~~

~~"Gross wages" include: W-2 items, vacation pay, including accrued vacation at time of dismissal, holiday pay, sick pay (excluding 3rd party sick pay), partnership and S Corporation~~

distributions of ordinary income from trade or business activities (do not report losses), draws taken for items other than business expenses, retroactive wages, bonuses, including stock options and stock bonuses, commissions, including draws against commissions, wages paid to summer interns, overtime wages, profit sharing, incentive programs, per diem payments to employees not directly related to travel, allocation to employees for such things as tools, equipment, machinery, etc. regardless if such allocation is labeled as per diem, hourly expense or other titles, stipend or other non-travel related payments to board members who are being covered under the employer's workers' compensation account, other compensation and perquisites paid to employees, owners and officers that have value, but are not per diem travel related, and value of gifts given to employees, owners, officers and board members.

~~“Gross wages” do not include: per diem expenses related to travel, the value of any special discount or markdown allowed a worker on goods or services purchased from or supplied by the employer if the purchase is optional with the worker and does not constitute regular or systematic remuneration for services, facilities or privileges such as cafeterias, restaurants, medical services or so-called ‘courtesy discounts’ on purchases furnished or offered by an employer merely as a convenience to workers or as a means of promoting their health, goodwill or efficiency, partnership and S-Corporation distributions other than ordinary income from trade or business activities, payments, not required under any contract of hire, made to an individual with respect to a period of training or service in the armed forces of the United States, severance pay, savings plan proceeds, third-party sick pay, and disability pay.~~

3.127. “Insurance Commissioner” means the insurance commissioner of West Virginia as provided for in section one, article two, chapter thirty-three of the West Virginia Code.

3.138. “Old Fund” means the fund created pursuant to ~~article two-c of chapter twenty-three of the West Virginia~~ W. Va. Code §23-2C-2(l).

3.9. “Old Fund default” means being on the insurance commissioner’s commission default list as defined in W. Va. Code St. R. § 85-11-1 et seq. as a result of owing money to the Old Fund.

3.1410. “Payroll” means ~~the entire gross wages of all employees not excluded under provisions of the Act or this rule, or such other wage-related exposure base as may be determined pursuant to chapter 23 of the West Virginia Code~~ term as defined in the most current version of the basic manual of the insurance commissioners’ designated rating organization for workers’ compensation.

3.1511. “Policy Default” means a policy holder that has failed to comply with the terms of its workers’ compensation insurance policy and is consequently without workers’ compensation coverage and shall include, but not be limited to, a policy holder’s failure to pay the regulatory surcharge and deficit reduction surcharge required by article two-c of chapter twenty-three of the West Virginia Code.

3.4612. "Policy holder" means an employer that has been issued a West Virginia workers' compensation insurance policy by a private carrier and currently has coverage under said policy.

3.4713. "Private carrier" means any insurer authorized by the insurance commissioner to provide workers' compensation insurance pursuant to chapters twenty-three and thirty-three of the West Virginia Code

3.4814. "Self-insurer" and "self-insured employer" mean employers who are eligible and have been granted self-insured status under the provisions of W. Va. Code §23-2-9.

3.15. "Some portion," as used in W. Va. Code §23-2-1c(a), and in this rule, means for a period of at least thirty (30) working days within any three hundred and sixty-five (365) day period.

3.16. "Temporary," as the term is used in W. Va. Code §§23-2-1(b)(3) and 23-2-1c(c), and in this rule, means for a period not exceeding ninety (90) working days within any three hundred and sixty-five (365) day period.

3.17. "Temporary and transitory," as the term is used in W. Va. Code §23-2-1a(a)(1) and this rule, means for a period of less than thirty (30) working days within any three hundred and sixty-five (365) day period.

3.18. "Temporary, intermittent or sporadic," as the term is used in W. Va. Code §§23-2-1(b)(3) and in this rule, means for a period not exceeding ten (10) working days in any ninety (90) day period.

3.19. "This rule" means this legislative rule designated as ~~85CSR8~~ W. Va. Code St. R. § 85-8-1 et seq., "Workers' Compensation Policies, Coverage Issues, Policy Defaults and Related Topics."

3.20. "Uninsured Employers' Fund" means the fund created pursuant W. Va. Code §23-2C-2(o).

3.21. "Uninsured Employers' Fund default" means being on the insurance commissioner's commission default list as defined in W. Va. Code St. R. § 85-11-1 et seq. as a result of owing money to the Uninsured Employers' Fund.

3.22. "West Virginia workers' compensation" means workers' compensation coverage which provides the employees of the insured employer workers' compensation benefits consistent with chapter twenty-three of the West Virginia Code and the rules promulgated thereunder.

#### **§85-8-4. Employers Required to Maintain Workers' Compensation Insurance; Exemptions; Predetermination.**

4.1. Duty to ~~register~~ maintain insurance. Every employer ~~subject to the Workers' Compensation Act (W. Va. Code §23-1-1 et seq.)~~ is required to obtain a West Virginia workers'

compensation policy for the protection of its employees.

4.2. Every employer shall have a continuous and ongoing duty to maintain current information with its current private carrier about the employer's business activities.

4.3 Exemptions. An employer may be exempt from having to maintain a West Virginia workers' compensation insurance policy if it meets one of the following criteria:

- a. The employer employs only employees in domestic services;
- b. The employer employs only five (5) or fewer full-time employees in agricultural services;
- c. All of the employer's employees perform labor for the employer outside of West Virginia, and the employment outside of West Virginia is not temporary: Provided, That the employer is able to show proof that the employer provides workers' compensation coverage for its employees under another state's laws where the non-temporary work is being performed;
- d. The employer is a casual employer;
- e. The employer is a church;
- f. The employer is engaged solely in organized professional sports activities, including employers of trainers and jockeys and jockeys engaged in thoroughbred horse racing;
- g. The employer is a volunteer rescue squad or volunteer police auxiliary unit organized under the auspices of a county commission, municipality or other government entity or political subdivision; a volunteer organization created or sponsored by a government entity, political subdivisions; or an area or regional emergency medical service board of directors in furtherance of the purposes of the emergency medical services act of article four-c [§§ 16-4C-1 et seq.], chapter sixteen of this code: Provided, That the employer must have no paid employees; or
- h. The employer employs only employees who are eligible to receive benefits under the federal Longshore and Harbor Workers' Compensation Act, 33 U. S. C. §901, et seq.

4.34. ~~Exemption determination~~ Predetermination of exempt status. An employer ~~shall make application~~ may apply to the insurance commissioner on forms supplied by the insurance commissioner for a letter of ~~exemption~~ predetermination as to whether the employer is exempt from coverage. The insurance commissioner will review the application for ~~exemption from coverage~~ predetermination and all evidence submitted by the employer applying for the predetermination and, based on the provisions of subsection 4.3 of this section, make such determination as ~~if he or she~~ he or she deems proper, either determining the employer to be exempt or not to be exempt. The insurance commissioner shall charge ~~each applicant for a letter of exemption from coverage~~ a processing fee

for each application in the amount of twenty-five dollars (\$25).

#### **§85-8-5. Auditing; Inspections; and Gross Wage Reporting.**

~~5.1. Each private carrier may include reasonable auditing, inspection and wage reporting provisions in its policy.~~

~~5.2. A private carrier may cancel a policy after providing fifteen (15) days advance written notice to a policy holder of its failure to comply with auditing, inspection, or reporting requirements of its policy. A private carrier shall provide the Insurance Commissioner with all applicable notices of said cancellation. The effective date of the termination shall be upon expiration of said fifteen (15) days.~~

#### **§85-8-6. Employees Covered; Employers Required to Subscribe Independent Contractors; Extraterritorial Coverage; Coverage Elections; Assignment; Predetermination.**

~~6.1. General. An employer's subscription for workers' compensation coverage~~ A West Virginia workers' compensation policy must cover all of its the employees of the insured employer who are mandated coverage and benefits by law under chapter twenty-three of the West Virginia Code and the rules promulgated thereunder.

~~6.2. Independent contractors. Services performed by a worker~~ All individuals performing services for wages are employment subject to this rule compensation paid by an employer are presumed to be employees and to be covered by an employer's workers' compensation insurance policy unless and until it is shown to the satisfaction of the private carrier that the worker is an independent contractor. The burden of showing that an individual is an independent contractor shall at all times be on the party asserting independent contractor status. In determining whether an independent contractor relationship or an employment relationship exists between the parties, the private carrier will examine information that provides evidence of the degree of control and the degree of independence exhibited by the parties the following criteria are dispositive, and are all required before an individual may be determined to be an independent contractor:

~~Facts that provide evidence of the degree of control fall into three categories: behavioral control, financial control, and the type of relationship between the parties. As the degree of control rises, the more the facts indicate that an employee/employer relationship exists. The private carrier is provided with discretion to weigh out the degree of control. Neither all categories of the degree of control, nor each element of every category, is required to determine that an employment relationship exists.~~

~~a. Behavioral control is whether the business has a right to direct and control how the worker does the task for which the worker is hired. Evidence of behavioral control includes whether the worker is subject to the business' instructions about when, where, and how to work. The key consideration is whether the business has retained the right to control the details of a workers'~~



~~performance or instead has given up that right.~~

~~b. Financial control is whether the business has a right to control the business aspects of a worker's job.~~

a. The individual holds himself or herself out to be in business for himself or herself; examples of facts supporting this include, but are not limited to:

1. The individual possesses a business license and/or any other license, permit or other certification required by federal, state and local authorities of business engaging in the type of work that is being performed by the individual;

2. The individual has entered into, or regularly enters into, verbal or written contracts with the persons and/or entities for whom the work is being performed, which have terms and conditions consistent with the other criteria stated in this subsection; and

3. The individual regularly solicits business from different persons or entities to perform for compensation the type of work that is being performed by the individual;

b. The individual has control over the time when the work is being performed, and the individual's work schedule is not being dictated by the person or entity for whom the work is being performed: Provided, That this criterion does not prohibit the person or entity for whom the work is being performed from reaching agreement with the individual as to completion schedule, range of work hours, and maximum number of work hours to be provided by the individual, and in the case of entertainment, the time such entertainment is to be presented;

c. The individual has control and discretion over the means and manner of performance of the work being performed by the individual and in achieving the result of the work; in other words, the individual is not being supervised by the person or entity for whom the work is being performed on an ongoing basis, but rather, the individual is given a description and expectation of the work to be performed at the outset of the retention of the individuals' services, and then is expected to perform the services contracted for without any ongoing supervision;

d. The individual is not required at any time to work exclusively for the person or entity for whom the work is being performed; and

e. If the use of equipment is required to perform the work being performed by the individual, the individual provides the most significant equipment required to perform the job. Some examples would be:

1. An independently contracted truck driver must use his or her own truck and trailer;

2. An independently contracted taxi cab driver must use his or her own vehicle;

3. An independently contracted timbering worker must use his or her own timbering equipment, including the equipment used to extract the trees and to transport the trees from their extraction site onto a loading site;

6.3.

a. Extraterritorial coverage in lieu of West Virginia coverage. If an employee or group of employees: (a) enter(s) into a contract of employment or otherwise consummate(s) an employment relationship with an employer in a state other than West Virginia; and (b) perform(s) some portion of his, her/their work in a state other than West Virginia (i.e., the extraterritorial work is not temporary or transitory in nature), then the employer and employee may enter into a written agreement to be bound by the laws of West Virginia or another state in which some portion of the work of the employee(s) is being performed.

b. If an agreement as described in subdivision a of this subsection provides that the employer and employee(s) are bound by the workers' compensation laws of a state other than West Virginia, the agreement shall be valid and enforceable, and any employee(s) entering into such an agreement shall be deemed to have waived their right to seek workers' compensation benefits under West Virginia's laws: Provided, That all such agreements shall be provided to the employers' private carrier immediately upon such agreements being entered into: Provided further, That the employer must at all times provide workers' compensation coverage for such "extraterritorial employees" under a state's workers' compensation laws where some portion of the work is being performed. Nothing in this subdivision shall be construed to leave any injured worker that is a resident of the state of West Virginia or performs some portion of work in West Virginia no recourse in any state in regard to workers' compensation benefits.

6.34. Elections to not provide coverage. Elections to not provide coverage to certain individuals, such as partners of a partnership, sole proprietors, members and certain investors in limited liability companies or certain corporate officers, are governed by the provisions of W. Va. Code §§23-2-1(g) and 31B-12-1207.

a. Certain corporate officers and all members of a corporation's board of directors may be elected out of coverage by an employer. A corporate officer or member of a corporate board of directors elected out of coverage by an employer shall not be entitled to the benefits of the ~~Workers' Compensation Act as provided in chapter 23 of the West Virginia Code.~~

1. The employers' election out of coverage of officers of a corporation is limited to four principal officers (~~a president, a vice-president, a secretary, and a treasurer~~) for the employer: (1) president; (2) vice-president; (3) secretary; and (4) treasurer. The four principal officers must be elected or appointed by the corporation's board of directors as prescribed by the

corporate bylaws. The employer is allowed to elect these four officers out of coverage even though their activities consist of work that is ordinarily performed by an officer and work that is ordinarily performed by a worker, an administrator or ~~an~~ other employee who is not an officer. An officer who performs both types of activities (officer/worker, administrator, or other ~~worker~~ employee who is not an officer) is deemed to be working in a “dual capacity.”

2. ~~“Other officers” and “assistant officers” may only be elected out of coverage if they are engaged in activities exclusive to their function as a corporate officer.~~ No other officer or assistant officer other than the four principal officers stated in paragraph 1 of this subdivision may be elected out of coverage if they are engaged in a dual capacity ~~of having duties and responsibilities for work ordinarily performed by an officer and also having duties and responsibilities for work ordinarily performed by a worker, administrator or employee who is not an officer.~~

3. Dual capacity is determined by the duties of the officer/employee. For an officer, other than the four principal officers stated in paragraph 1 of this subdivision to be eligible to be elected out of coverage, that officer cannot have duties and perform work that also would ordinarily be done by a worker, administrator or other employee who is not an officer. It is the employer's duty burden to show that ~~work~~ duties performed by ~~other~~ officers or assistant officers other than the four principal officers are not dual capacity activities and that the work could only be performed by an officer of a corporation. Examples of such showings are a vice president within a corporation (not the one vice president allowed to be elected out of coverage as one of the four principle officers) ~~that who~~ only attends board meetings and ~~the~~ an assistant secretary whose only job is to affix the corporate seal to corporate papers.

4. Members of corporate boards of directors may be elected out of coverage by an employer, regardless of whether the member of the board of directors works in a dual capacity. It is the employer's duty burden to show that the individual elected out of coverage is, in fact, a member of the board of directors and is, in fact, vested with the authority to manage the affairs of the corporation as a member of the employer's board of directors. Members of corporate boards of directors who do not receive “gross wages” from the employer for their activities are not “employees” within the meaning of ~~the Workers’ Compensation Act~~ chapter twenty-three of the West Virginia Code and are not entitled to the benefits of ~~the Act~~ chapter twenty-three of the West Virginia Code.

b. Certain members of a limited liability company may be elected out of coverage by an employer. “Limited liability companies” include those entities created pursuant to the “Uniform Limited Liability Company Act” of ~~Chapter 31B~~ chapter thirty-one b of the ~~Code of~~ West Virginia Code. These entities consist of all forms of limited liability companies, including, but not limited to, manager-managed limited liability companies, member-managed limited liability companies, foreign limited liability companies and professional limited liability companies.

1. Limited liability companies ~~that~~ may elect not to include as an “employee”

for purposes of workers' compensation coverage a total of not more than four (4) persons. Each of the persons elected out of coverage by the employer is required to be acting in the capacity of a manager, officer or member of the limited liability company.

~~2. All covered members of limited liability companies which are treated as partnerships for federal income tax purposes shall be subject to the calculation of premiums on the members as provided for partners in a partnership in W. Va. Code §23-2-1b.~~

6.45. Manner of notification. In the event of an election under W. Va. Code §23-2-1(g) and subsection 6.4 of this ~~rule~~ section, the employer shall provide to the private carrier written notice naming the positions not to be covered and the names and social security numbers of the ~~persons~~ individuals occupying those positions, and shall not include such ~~"employee's"~~ individuals' gross wages for premium purposes in future payroll reports. Such partner(s), member/manager(s), proprietor(s) or corporate or executive officer(s) as named in the notification shall not be deemed an employee within the meaning of ~~the Act~~ chapter twenty-three of the West Virginia Code after such notice has been served.

a. Elections not to be covered made under subsection 6.4 of this ~~rule~~ section are effective for the next policy period after the written notification in this subsection is received by the private carrier and each policy period thereafter with the same private carrier without subsequent ~~election~~ written notification.

b. Elections not to be covered are valid only for the ~~persons~~ individuals named in the written notice ~~to the commission~~ provided for in this subsection. Such an election is not valid for any ~~person~~ individual who may later hold the same position, office or title until an amendment to the election is made in accordance with this rule.

c. Amendments to an election written notification may be made only for the purpose of:

1. Changing the named person for any office or position previously reported on the election; or

2. Making an election for persons who were not previously employed as a sole proprietor, partner, officer, or member of the board of directors on the date the election was made; or

3. Making such election upon changing private carriers: Provided, That an employer must disclose the written notification, in its entirety, to the new private carrier prior to the effective date of the insurance policy; or

4. Adding a person who has previously elected not to be covered under the provisions of subsection 6.34 of this ~~rule~~ section if the private carrier receives written notification

sixty (60) days prior to the coverage period in which coverage is sought. If written notification is not received by the private carrier sixty (60) days prior to the coverage period (~~fiscal year July 1 through June 30~~) in which coverage is sought, then coverage shall not be extended to such person requesting coverage beginning that coverage period, but shall instead be extended to the following coverage period. The written notification shall clearly identify the coverage period in which coverage is sought to begin.

6.56. Owners and officers; Coverage denials when the employer is ~~delinquent or~~ in default.

a. Employers ~~who~~ that are required, but fail to subscribe for maintain West Virginia workers' compensation coverage shall not be afforded coverage for its partners, the proprietor or its corporate or executive officers, nor shall coverage or benefits be afforded through the uninsured fund or any other fund of the insurance commissioner to any "employee" individual for whom the employer may elect to forego coverage under the provisions of W. Va. Code §23-2-1(g) including, but not limited to, members of corporate boards of directors or certain members of a limited liability company.

b. Employers who are in ~~default or in~~ Old Fund, Uninsured Fund or policy default of ~~their workers' compensation obligations~~ shall not be afforded workers' compensation coverage for its partners, the proprietor or its corporate or executive officers, nor shall coverage or benefits be afforded through the uninsured fund or any other fund of the insurance commissioner to any "employee" individuals for whom the employer may elect to forego coverage under the provisions of W. Va. Code §23-2-1(g) including, but not limited to, members of corporate boards of directors or members of a limited liability company.

1. Coverage for the "employees" individuals specified in this ~~provision~~ subsection shall not be afforded if the employer is in ~~default~~ Old Fund, Uninsured Employers' Fund or in policy default on the date of injury, and this exclusion will continue for the life of that injury. For example, if, at some time after the date of injury, the employer cures its default status, ~~the~~ "employee" an individual specified in this subsection that incurs an injury on a date while the employer was in default status nevertheless will not be covered for the injury that occurred during the period of default or delinquency and benefits will never be payable for that injury.

2. Benefits paid during periods of ~~default~~ Old Fund, Uninsured Fund or policy default for "employees" individuals denied coverage under this ~~provision~~ subsection shall be considered overpayments.

3. ~~When coverage for an injury is denied to an "employee" as a result of the employer's default or policy default, the injured "employee" may only contest the determination through the provisions of 85CSR7, "Rules for Selected Hearings," and the provisions of W. Va. Code §23-2-17. Until the conclusion of the W. Va. Code §23-2-17 process and the determination of whether the "employee" is afforded coverage, action in the claim will be held in abeyance.~~

~~6.6. Employment activities within and outside state borders; reporting.~~

~~a. The entire gross wages of employees, whose contracts of hire have been consummated within the borders of West Virginia, whose employment involves activities both within and without the borders of West Virginia, and where the supervising office of the employer is located in West Virginia, shall be included in the payroll report.~~

~~b. The gross wages of employees of other than West Virginia employers, who have entered into a contract of employment outside of West Virginia to perform transitory services in interstate commerce only, both within and outside the boundaries of West Virginia, shall not be included in the payroll report.~~

~~c. The office of the insurance commissioner respects the extra-territorial right of the workers' compensation insurance coverage of an out-of-state employer for his regular employees, whose contracts of hire have been consummated in some state other than West Virginia, while performing work in the state of West Virginia for a temporary period not to exceed ninety working (90) days in any three hundred sixty-five day period.~~

~~1. Employees whose contracts of hire are consummated at a job site in West Virginia or employees who have been hired to work specifically in West Virginia must be protected for workers' compensation insurance in accordance with the provisions of W. Va. Code §23-1-1 et seq.~~

~~d. Where there is a conflict with respect to the application of the workers' compensation law, the provisions of W. Va. Code §23-2-1c, apply. The employer requesting coverage under such provisions shall supply the names and social security numbers of each employee sought to be covered under such provisions to the office of the insurance commissioner.~~

~~e. Workers' compensation coverage for temporary or transitory employment activities outside the State of West Virginia extends only to the time limit as defined and determined by the requirements of coverage of such other state or other jurisdiction.~~

6.7.

a. Duty to report all payroll. All employers have a duty to report the entire payroll of all employees to their private carrier.

b. The private carrier has an absolute right to make its own initial decision regarding the status of individuals as to whether they are "employees" subject to the provisions of chapter twenty-three of the West Virginia Code, and reserves the right to include the payroll of certain individuals within an employers' payroll for premium determination if it disagrees with the employer in regard to the status of certain individuals: Provided, That any employer that disagrees with the determination by its private carrier as described in this subsection is permitted to file a consumer

complaint against the private carrier with the insurance commissioner.

c. Nothing in this subsection shall be construed to permit an employer to deviate from the procedures set forth in subsection 6.5. of this rule regarding elections not to provide coverage to certain individuals.

6.78. Limited partner. A "limited partner" as defined and provided by the Uniform Limited Partnership Act (W. Va. Code §47-9-1 et seq.) is not an employee of an employer which is a limited partnership subject to the mandatory or elective provisions of ~~the Act~~ chapter twenty-three of the West Virginia Code, unless that person is employed in the service of the limited partnership for the purpose of carrying on the industry, business, service or work in which it is engaged.

6.89. Investors. A person who is solely an investor and who does not participate in the direction, administration, or control of a business or venture and its activities or investments is not an employee of an employer subject to the mandatory or elective provisions of ~~the Act~~ chapter twenty-three of the West Virginia Code, unless that person is employed in the service of the business or venture for the purpose of carrying on the industry, business, service or work in which it is engaged.

#### **§85-8-7. The Workers' Compensation Insurance Policy.**

7.1. Each policy for West Virginia workers' compensation insurance shall be submitted to and approved by the insurance commissioner and otherwise consistent with the provisions of chapter thirty-three and otherwise comply with chapter thirty-three of the West Virginia Code ~~unless a waiver of a specific provision of Chapter 33 of the Code is secured by a private carrier from the West Virginia insurance commissioner.~~

7.2. Each West Virginia workers' compensation insurance policy shall provide coverage and benefit payments, consistent with the provisions of chapter twenty-three of the West Virginia Code and the rules promulgated thereunder, for any ~~bodily injury with a date of injury within the policy period and for all benefits types thereafter awarded, including all dependent benefits and related death benefits provided for under Chapter 23 of the West Virginia Code.~~ Each workers' compensation policy shall also provide coverage for any occupational disease or occupational pneumoconiosis award with a date of last exposure within the policy period, including all dependent benefits and related death benefits provided for under Chapter 23 of the West Virginia Code. ~~Additionally, with regard to claims which can be allocated under the West Virginia Code, each policy shall be deemed to provide coverage for all payment obligations~~ employee of the insured employer who is required to be covered by a West Virginia workers' compensation policy.

7.3. Upon issuance of a policy, each private carrier is deemed to have reserved its right to select, retain, and compensate legal counsel to defend any claims decisions made by the private carrier which are protested under article five, chapter twenty-three of the West Virginia Code and to settle said claims in accordance with all applicable statutes and rules, ~~and regulations, and to elect~~

not to defend a protest.

~~7.4. The termination of a policy for failure to pay the initial premium shall be deemed effective as of the first date of the policy.~~

~~7.54. Each private carrier shall assess its policyholders any applicable deficit reduction surcharge, or insurance commissioner regulatory surcharge, Uninsured Employers' Fund assessment, and/or Private Carrier Guaranty Fund assessment and remit as directed by the insurance commissioner. The obligation of the private carrier is limited solely to the collection and remittance of the proper percentage amount of the surcharges and assessments, as established by the insurance commissioner. The private carrier has no obligation to the insurance commissioner or to the Debt Reduction Fund to make up any difference in the amount projected to be collected as a result of the surcharge percentage set by the insurance commissioner and the amount actually collected amounts that are not collected as a result of the insured employer's failure to pay their premium.~~

#### **§85-8-8. Notification of Coverage, Change and Cancellation.**

8.1. Upon cancellation or non-renewal of a West Virginia workers' compensation policy, every private carrier is required to notify both the insurance commissioner and its designated rating organization of said issuance, cancellation or non-renewal within twenty-four (24) hours, or by the end of the next working day, which ever is later.

8.2. Upon issuance of a West Virginia workers' compensation policy, every private carrier is required to notify both the insurance commissioner and its designated rating organization of said issuance within thirty (30) business days.

8.3. A private carrier may cancel a workers' compensation policy for failure of the policyholder to timely and properly remit premium payments upon the issuance of advance written notification to the policyholder of no less than fifteen (15) business days. The effective date of cancellation shall be no earlier than the expiration of the fifteen (15) days of advance written notice.

8.4. Private carriers may cancel or decline to renew a workers' compensation policy for reasons other than non-payment of premiums, consistent with the terms of the policy, upon the issuance of advance written notification to the policyholder of no less than sixty (60) business days. The effective date of cancellation shall be no earlier than the expiration of the sixty (60) days of advance written notice.

8.5. Advance written notification of cancellation or non-renewal to the insured by private carriers must be forwarded to the insured by certified mail, return receipt requested, and must state with specificity the reason for the cancellation or non-renewal and the specific effective date of cancellation or non-renewal.

#### **§85-8-9. Rating Organizations.**



9.1. All private carriers may become a member of a rating organization as provided for in chapter thirty-three of the West Virginia Code to perform said duties set forth in chapter thirty-three of the West Virginia Code: Provided, That said rating organization has otherwise complied with chapter thirty-three of the West Virginia Code.

9.2. The insurance commissioner may designate a workers' compensation rating organization that has been licensed in accordance with W. Va. Code §33-20-6 to assist the commissioner in gathering, compiling, and reporting relevant statistical information and data. Each workers' compensation insurer shall record and report its workers' compensation experience to the designated rating organization as set forth in the uniform statistical plan submitted by the designated rating organization and approved by the insurance commissioner. The designated worker's compensation rating organization may develop (i) a uniform policy form; (ii) statistical plans; (iii) experience rating plans; and (iv) classification systems and other rating plans for use by its members and subscribers in the provision of workers' compensation insurance and the reporting of the experience of this line of insurance. The rating organization may also develop manual rules for the recording and reporting of experience data of members pursuant to its uniform plans and systems. Such uniform plans, systems, and rules shall be filed with the insurance commissioner by the rating organization pursuant to the same process that applies to other commercial lines prior to their use by members of the rating organization.

9.3. Every workers' compensation insurer shall adhere to policy forms, rules, uniform classification system and uniform experience and retrospective and other rating plans that have been filed with the commissioner by such designated rating organization and approved by the commissioner.

9.4. Upon the insurance commissioner's designation of a workers' compensation rating organization to be utilized by all insurers, the loss cost, rule, or form filings made by the designated rating organization shall be utilized by every member of the rating organization without modification and as of the effective date of the relevant rating organization filing unless the member specifically requests deviation from the same in writing, or unless the member makes an exception basis filing pursuant to W. Va. Code §33-6-8 or §33-20-4.

## **§85-8-810. Ratemaking.**

### ~~8.1. Fiscal Year 2007.~~

~~a. For the fiscal year beginning the first day of July, 2006, the West Virginia Employers' Mutual Insurance Company shall determine premium rates based on the actuarially determined base rates for the fiscal year. The base rates shall be calculated by the Mutual and submitted for approval by the insurance commissioner.~~

~~b. The base rate shall be the loss cost for each classification as approved by the~~

~~insurance commissioner. The loss cost base rate shall include a provision for the actuarially determined expected losses and may also include provision for some or all loss adjustment expenses, including the cost of investigation, defense, experts, legal fees, claims administration, cost containment and similar or related expenses, in accordance with generally accepted or commonly used insurance accounting practices.~~

~~c. In addition to said loss cost base rates, the premium rates charged by the Mutual may also include (1) a reasonable provision for expenses related to the administration costs of the Mutual, including underwriting expenses, such as commissions to agents and brokers, other policy acquisition or servicing expenses, premium taxes, assessments and fees, catastrophe reinsurance expenses, expenses associated with advisory organizations and/or rating organizations, loss adjustment expenses not included in the loss cost base rates, such as claims defense expenses, claim administration expenses, and other related expenses; (2) a reasonable profit and contingency provision to contribute to the Mutual's surplus; and (3) all other rate making components consistent with industry practices. All such provisions shall be subject to approval by the insurance commissioner.~~

~~d. The Mutual may offer premium credits and debits through schedule rating plans which are consistent with industry practices. The ultimate premium net said credits and debits shall not violate the West Virginia Code Section 23-2C-18(f)(1). Any credit or debit applied to the insured shall reasonably reflect (1) appropriate judgment of the Mutual as to the risk and/or exposure characteristics of the insured; (2) the Mutual's interpretation of any statistical data; (3) the insured's adoption or refusal to adopt relevant loss limiting practices; and (4) other relevant considerations. All such plans or practices utilizing premiums credits and debits shall be subject to approval by the insurance commissioner.~~

~~e. The Mutual may adopt tiered rating, scheduled rating plans, experience rating plans, deductible plans, retrospectively rated plans and other similar rating plans as it deems appropriate. All such rating plans shall be subject to the filing requirements of Chapter 33 of the Code that are applicable to commercial insurance lines. Under a deductible plan, an insured that fails to make a claim payment within the deductible shall be deemed uninsured for said claim and shall be subject to all penalties and consequences of being uninsured as set forth in Chapter twenty-three of the West Virginia Code.~~

~~f. In addition to the premium charges determined, the Mutual shall charge (1) all deficit reduction surcharges as provided for in chapter twenty-three of the West Virginia Code; (2) all regulatory surcharges required to fund the insurance commissioner's regulation of the workers' compensation industry. All collected surcharges shall be remitted as directed by the insurance commissioner.~~

## ~~8.2. Fiscal Year 2008.~~

~~a. For the fiscal year beginning the first day of July, 2007, the West Virginia~~

~~Employers' Mutual Insurance Company shall determine premium rates based on the actuarially determined base rates for the fiscal year. The base rates shall be calculated by the Mutual and submitted for approval by the insurance commissioner.~~

~~b. The base rate shall be the loss cost for each classification as approved by the insurance commissioner. The loss cost base rate shall include a provision for the actuarially determined expected losses and may also include provision for some or all loss adjustment expenses, including the cost of investigation, defense, experts, legal fees, claims administration, cost containment and similar or related expenses, in accordance with generally accepted or commonly used insurance accounting practices.~~

~~c. In addition to said loss cost base rates, the premium rates charged by the Mutual may also include (1) a reasonable provision for expenses related to the administration costs of the Mutual, including underwriting expenses, such as commissions to agents and brokers, other policy acquisition or servicing expenses, premium taxes, assessments and fees, catastrophe reinsurance expenses, expenses associated with advisory organizations and/or rating organizations, loss adjustment expenses not included in the loss cost base rates, such as claims defense expenses, claim administration expenses, and other related expenses; (2) a reasonable profit and contingency provision to contribute to the Mutual's surplus; and (3) all other rate making components consistent with industry practices. All such provisions shall be subject to approval by the insurance commissioner.~~

~~d. The Mutual may offer premium credits and debits through schedule rating plans which are and consistent with industry practices. The ultimate premium net said credits and debits shall not violate the W. Va. Code § 23-2C-18(f)(1). Any credit or debit applied to the insured shall reasonably reflect (1) appropriate judgment of the Mutual as to the risk and/or exposure characteristics of the insured; (2) the Mutual's interpretation of any statistical data; (3) the insured's adoption or refusal to adopt relevant loss limiting practices; and (4) other relevant considerations. All such plans or practices utilizing premiums credits and debits shall be subject to approval by the insurance commissioner.~~

~~e. The Mutual may adopt tiered rating, scheduled rating plans, experience rating plans, deductible plans, retrospectively rated plans and other similar rating plans as it deems appropriate. All such rating plans shall be subject to the filing requirements of Chapter 33 of the Code that are applicable to commercial insurance lines. Under a deductible plan, an insured that fails to make a claim payment within the deductible shall be deemed uninsured for said claim and shall be subject to all penalties and consequences of being uninsured as set forth in Chapter twenty-three of the West Virginia Code.~~

~~f. In addition to the premium charges determined, the Mutual shall charge (1) all deficit reduction surcharges as provided for in chapter twenty-three of the West Virginia Code; (2) all regulatory surcharges required to fund the insurance commissioner's regulation of the workers' compensation industry. All collected surcharges shall be remitted as directed by the insurance~~

commissioner.

~~8.3.~~ 10.1. Fiscal Year 2009.

a. For the fiscal year beginning the first day of July, 2008, all private carriers shall determine their ~~premium~~ base rates based on the actuarially determined ~~base rates~~ loss costs filed by and approved for the designated rating organization. All private carriers shall additionally adhere to the rating rules filed by and approved for the designated rating organization unless the private carrier makes a filing to permit deviation from the same. ~~The base rate shall be either 1) the base rate filed by a licensed rating organization and approved by the insurance commissioner; or 2) the base rate promulgated by the insurance commissioner; Provided that the private carrier may file for approval of a deviation of the base rate by classification in an amount not to exceed five percent (5%) of the approved or promulgated base rate.~~

~~b. The base rate shall be the loss cost for each classification as approved by the insurance commissioner. The loss cost base rate shall include a provision for the actuarially determined expected losses and may also include provision for some or all loss adjustment expenses, including the cost of investigation, defense, experts, legal fees, claims administration, cost containment and similar or related expenses, in accordance with generally accepted or commonly used insurance accounting practices.~~

~~eb. In addition to said loss cost base rates, the premium~~ The base rates charged by the private carriers may also include: (1) a reasonable provision for expenses related to the administration costs of the private carrier, including underwriting expenses, such as commissions to agents and brokers, other policy acquisition or servicing expenses, premium taxes, assessments and fees, catastrophe reinsurance expenses, expenses associated with ~~advisory organizations and/or~~ rating organizations, loss adjustment expenses not included in the loss costs ~~base rates~~, such as claims defense expenses, claim administration expenses, and other related expenses; (2) a reasonable profit and contingency provision to contribute to the private carrier's surplus; and (3) all other rate making components consistent with industry practices. All such provisions shall be subject to approval by the insurance commissioner pursuant to W. Va. Code §33-20-4. Any filing made to establish or amend a loss cost multiplier which accounts for expenses shall be deemed effective until such time as the private carrier makes another filing to adjust the same.

~~dc. Private carriers may offer premium credits and debits through schedule rating plans which are and~~ consistent with industry practices. The ultimate premium net said credits and debits shall not violate the ~~West Virginia Code Section~~ W. Va. Code §23-2C-18(f)(1). All such rating plans shall be subject to the filing requirements of chapter thirty-three of the West Virginia Code that are applicable to other commercial insurance lines. Any credit or debit applied to the insured shall reasonably reflect: (1) appropriate judgment of the private carrier as to the risk and/or exposure characteristics of the insured; (2) the private carrier's interpretation of any statistical data; (3) the insured's adoption or refusal to adopt relevant loss limiting practices; and (4) other relevant considerations. ~~All such plans or practices utilizing premiums credits and debits shall be subject to~~

approval by the insurance commissioner.

~~ed. Private carriers may adopt tiered rating, scheduled rating plans, experience rating plans, deductible plans, retrospectively rated plans and other similar rating plans as it deems appropriate. All such rating plans shall be subject to the filing requirements of Chapter 33 of the Code that are applicable to commercial insurance lines. Deductible plans. Under a deductible plan, an insured that fails to make a claim payment within the deductible shall be deemed uninsured for to be in default of the policy premium, but such default shall not affect said claim and shall be subject to all penalties and consequences of being uninsured as set forth in Chapter twenty-three of the West Virginia Code in regard to the injured employee, and the private carrier will ultimately be responsible for paying and administering the claim.~~

#### ~~8.4. Fiscal Year 2010.~~

~~a. For the fiscal year beginning the first day of July, 2009, all private carriers shall determine their premium rates based on the actuarially determined base rates. The base rate shall be either 1) the base rate filed by a licensed rating organization and approved by the insurance commissioner; or 2) the base rate promulgated by the insurance commissioner; Provided that the private carrier may file for approval of a deviation of the base rate by classification in an amount not to exceed ten percent (10%) of the approved or promulgated base rate.~~

~~b. The base rate shall be the loss cost for each classification as approved by the insurance commissioner. The loss cost base rate shall include a provision for the actuarially determined expected losses and may also include provision for some or all loss adjustment expenses, including the cost of investigation, defense, experts, legal fees, claims administration, cost containment and similar or related expenses, in accordance with generally accepted or commonly used insurance accounting practices.~~

~~c. In addition to said loss cost base rates, the premium rates charged by the private carriers may also include (1) a reasonable provision for expenses related to the administration costs of the private carrier, including underwriting expenses, such as commissions to agents and brokers, other policy acquisition or servicing expenses, premium taxes, assessments and fees, catastrophe reinsurance expenses, expenses associated with advisory organizations and/or rating organizations, loss adjustment expenses not included in the loss cost base rates, such as claims defense expenses, claim administration expenses, and other related expenses; (2) a reasonable profit and contingency provision to contribute to the private carrier's surplus; and (3) all other rate making components consistent with industry practices. All such provisions shall be subject to approval by the insurance commissioner.~~

~~d. Private carriers may offer premium credits and debits through schedule rating plans which are and consistent with industry practices. The ultimate premium net said credits and debits shall not violate the West Virginia Code Section 23-2C-18(f)(1). Any credit or debit applied to the insured shall reasonably reflect (1) appropriate judgment of the private carrier as to the risk~~

and/or exposure characteristics of the insured; (2) the private carrier's interpretation of any statistical data; (3) the insured's adoption or refusal to adopt relevant loss limiting practices; and (4) other relevant considerations. All such plans or practices utilizing premiums credits and debits shall be subject to approval by the insurance commissioner.

~~e. Private carriers may adopt tiered rating, scheduled rating plans, experience rating plans, deductible plans, retrospectively rated plans and other similar rating plans as it deems appropriate. All such rating plans shall be subject to the filing requirements of Chapter 33 of the Code that are applicable to commercial insurance lines. Under a deductible plan, an insured that fails to make a claim payment within the deductible shall be deemed uninsured for said claim and shall be subject to all penalties and consequences of being uninsured as set forth in Chapter twenty-three of the West Virginia Code.~~

~~fe. In addition to the premium charges determined, private carriers shall charge (1) all deficit reduction surcharges as provided for in chapter twenty-three of the West Virginia Code and W. Va. Code St. R. § 85-6-1 et seq.; (2) all regulatory surcharges required to fund the insurance commissioner's regulation of the workers' compensation industry; and (3) all assessments made by the insurance commissioner for the funding of the Uninsured Employers' Fund or the Private Carrier Guaranty Fund as defined in W. Va. Code §23-2C-1 et seq. All collected surcharges shall be remitted as directed by the insurance commissioner.~~

#### **~~§85-8-9. Rating Organizations.~~**

~~9.1. All private carriers may become a member of an advisory organization and/or a rating organization as provided for in Chapter thirty-three of the West Virginia Code to perform said duties set forth in Chapter thirty-three of the West Virginia Code; Provided that said advisory organization and/or rating organization has otherwise complied with Chapter thirty-three of the West Virginia Code.~~

~~9.2. The Insurance Commissioner may designate a workers' compensation rating organization that has been licensed in accordance with West Virginia Code §33-20-6 to assist the commissioner in gathering, compiling, and reporting relevant statistical information and data. Each workers' compensation insurer shall record and report its workers' compensation experience to the designated rating organization as set forth in the uniform statistical plan submitted by the designated rating organization and approved by the Insurance Commissioner. The designated worker's compensation rating organization may develop (i) a uniform policy form (ii) statistical plans, (iii) experience rating plans, (iv) classification systems and other rating plans for use by its members and subscribers in the provision of workers' compensation insurance and the reporting of the experience of this line of insurance. The rating organization may also develop manual rules for the recording and reporting of experience data of members pursuant to its uniform plans and systems. Such uniform plans, systems, and rules shall be filed with the insurance commissioner by the rating organization pursuant to the same process that applies to other commercial lines prior to their use by members of the rating organization.~~

~~9.3. Each workers' compensation insurer must be a member or subscriber of the designated workers' compensation rating organization. Every workers' compensation insurer shall adhere to policy forms, rules, uniform classification system and uniform experience and retrospective and other rating plans that have been filed with the commissioner by such designated rating organization and approved by the commissioner.~~

**§85-8-1011. Severability.**

If any provision of these rules or the application thereof to any entity or circumstance shall be held invalid, such invalidity shall not affect the provisions or the applications of these rules which can be given effect without the invalid provisions or application and to this end the provisions of these rules are declared to be severable.